

TMH

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ARZELL WILKERSON,

Plaintiff,

vs.

CAPITAL ONE,

Defendant.

CIVIL ACTION NO.  
CV-04-2865-TMH

FILED  
CIRCUIT COURT OF  
MONTGOMERY COUNTY  
2005 JUN 16 PM 3:46

MOTION TO DISMISS COMPLAINT

COME NOW the Defendants, designated in the Complaint and the Summons as "Capital One" and "Capital One Services, Inc.," and hereby move this Court to dismiss the Plaintiff's Complaint on the following grounds:

1. Plaintiff's Complaint was filed on October 27, 2004. The Complaint designates "Capital One" as the defendant. "Capital One" is a registered trademark and is a non-entity. As such, the Complaint should be dismissed.

2. The Summons purports to designate "Capital One Services, Inc." as the defendant in this case. It is well settled under Alabama law that the Summons does not designate the parties. The parties designated in the Complaint is controlling. See Ala. R. Civ. P. 10. To the extent the Court looks to the Summons, "Capital One Services, Inc." is not a proper party to this action.

3. As such, Plaintiff's Complaint is void because neither Capital One nor Capital One Services, Inc. are the proper parties in this case. See Ala. R. Civ. P. 17. The

proper party to this action is Capital One, F.S.B. As such, process and service of process are insufficient. *See* Ala. R. Civ. P. 12(b)(4) and (5).

4. Plaintiff's Complaint should also be dismissed without prejudice pursuant to Ala. R. Civ. P. 4(b) because the Summons and Complaint was not served within 120 days of filing the Complaint. The Summons and Complaint were filed on October 27, 2004. The Summons and Complaint were purportedly served almost seven (7) months later on May 10, 2005. Because proper service of the Summons and Complaint has not been made on a proper party, Plaintiff's Complaint should be dismissed. In the alternative, Plaintiff should be granted leave to file an amended Complaint and serve the proper party as set forth below within ten (10) days of this Court's Order.

5. Capital One Bank requests that the Court enter an Order allowing Plaintiff ten (10) days to amend the Complaint to add the proper party. Undersigned counsel will accept service on behalf of Capital One, F.S.B. Service can be perfect by mailing a copy of the amended Summons and Complaint to Rik S. Tozzi at Starnes & Atchison LLP, Post Office Box 598512, Birmingham, Alabama 35259-8512.

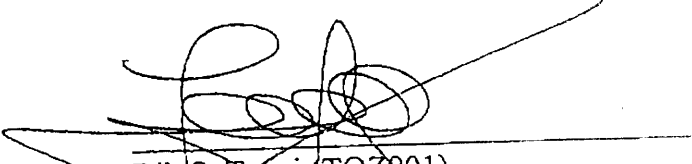
6. The Plaintiff's Complaint fails to state a claim upon which relief can be granted. *See* Ala. R. Civ. P. 12(b)(6).

7. Montgomery County, Alabama is an improper venue for claims against either "Capital One" or "Capital One Services, Inc."

8. This Court lacks personal and/or subject matter jurisdiction over either "Capital One" or "Capital One Services, Inc."

9. The Plaintiff has failed to join all proper parties under Ala. R. Civ. P. 19.

WHEREFORE, PREMISES CONSIDERED, the Defendants designated in the Complaint as "Capital One" and "Capital One Services, Inc." request that the Plaintiff's Complaint be dismissed without prejudice and that Plaintiff be required to serve the proper party to this action as set forth above.



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CERTIFICATE OF SERVICE

I do hereby certify that I have caused a copy of the foregoing pleading to be mailed to counsel for all parties to this action on this the 1<sup>st</sup> day of June, 2005.



OF COUNSEL

cc:

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